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ABSTRACT

The United States federal government, through a combination of statutes and regulations, has imposed restrictions on the activities of photojournalists that are not equally applicable to those of their print colleagues. For example, two statutes of the United States Code prohibit the photographing of defense installations and military equipment and one statute bans photographs from closed military posts. Even though some of the stronger provisions of the statutes have lapsed, they are still used as the basis of some military regulations, and photographers must still gain the permission of the commanding officer of a military site before using cameras. Congress should reexamine these regulations for their prior restraint effects to determine if they are unnecessarily vague on the question of intent and to clarify the definition of the term "publication" as it is used in the statutes in order to determine if this definition violates the First Amendment. (FL)

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ABSTRACT

SHUTTERED SHUTTERS: The Photographic Statutes And Their Faithful Companion, 18 USC 1382 -- An Examination of Photographic Access to Military Areas

by

Caroline Dow Dykhouse
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This paper examines the statutes, related regulations and case law that govern the relationship between press photographers and the United States military. The photographic statutes, 50 USC 781-85 and 18 USC 795-97, prohibit photography of defense installations and equipment and the trespass statute, 18 USC 1382, prohibits entry to a closed post.

The two sets of statutes are used together to prohibit entry to posts, defense areas and military air crash sites with cameras because the obvious intent is to photograph defense material and that is entry with intent to commit an "illegal act."

The stronger provisions of 50 USC 781-85 have lapsed but still are used as the basis of some military regulations. Permission of the Commanding Officer is required under all statutes.

The paper recommends the deletion of the now-defunct 50 USC 781-85 from the United States Code and from the Code of Federal Regulations and recommends that Congress examine the photographic statutes in light of:

1. Their certain effect of prior restraint on publication,
2. The possibility that they are impermissibly vague on the question of intent, and
3. Whether the term publication in 18 USC 797 violates the First Amendment.

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INTRODUCTION

The federal government, by a combination of statute and regulation, has imposed restrictions on the activities of visual journalists which are not equally applicable to the activities of word journalists. This work will discuss these special restrictions on the visual journalist who carries cameras, video or still, into or near military areas or near physically exposed classified information with the intention of carrying away, editing, and publishing the visual information. It should be made clear that many restrictions are levied on visual journalists because of the form in which they store and transmit their information. Except where noted, it is the information per se which is restricted and any later rendition of it in visual form (sketches from memory, for instance) is also prohibited.

These statutes are in 18 USC Chapters 37, Espionage and Censorship, and 67, Military and Navy, and 50 USC Sections 781 and 785. Photographers are specifically mentioned in 18 USC 795, "Photographers and Sketching Defense Installations;" 18 USC 796, "Use of aircraft for photographing defense installations;" and 18 USC 797, "Publication and sale of photographs of defense installations;" Title 50, Sections 781-785, "Photographing, Mapping or other Representation of Military or Defense Properties" and 18 USC 1382, "Military and Navy," also affect visual journalists. All of these statutes are listed in the 1981 Edition of the United States Code Annotated, although this author believes one set, 50 USC

781-785, was required to expire in 1978. Please see pages 24 and 25.

These sections are broader than the other statutes and, whether in force or not, continue to affect the relationship between the military and photographers because they were in force when most of the military regulations were written.

The four statutes presently in force, 18 USC 795-7, and 1382, work together with the military regulations and cases interpreting them to effectively prohibit press photographers from taking any pictures in a military area without the express permission of the person in charge of that area. They form an effective barrier against press photography in a military area regardless of the real purpose of the photographs. Not only do they stop inadvertent military security leaks, but also they shield the military from the proper and effective coverage of demonstrations, court materials, preventable accidents, excesses in military discipline or misuse of government money.

The author believes that 18 USC 797 may be the only law that makes publication of a photograph a crime per se. There is a question whether this law might be overbroad or restrict the freedom of the press. However, it exists, and a photographer could be prosecuted and perhaps convicted for publishing a photograph which inadvertently contained classified material. This paper will outline the restrictions that apply to photojournalists and the legislative history of those restrictions. This is done in the belief that it is only when we know the past and recognize the present that we can plan for the future.

THE STATUTES

Photographic Statutes

Title 18, Sections 795, 796, and 797 of the United States Code makes it a crime to photograph or sketch any defense property that is marked classified with the designation of top secret , secret , confidential[1], or restricted : Section 796 makes it a crime to use any aircraft to photograph any defense installations, and Section 797 specifically prohibits the publication and sale of photographs or sketches of defense property designated "top secret, secret, confidential, or restricted." All three sections require the permission of the person in charge of the military area to even take a picture if there is restricted property in view. If a picture is taken, it must be "promptly submitted to the commanding officer ... for censorship or such other action as he may deem necessary." (18 USC 795) The actual statutes are reproduced at the end of this section on pages 8 and 9.

Although these "photographic statutes" date from 1917, there have been no appellate court cases in which an interpretation of these statutes was crucial to the decision of the case. They have been discussed, however, in the dicta of several cases, the most prominent of which is NY Times v United States, 403 US 713, 91 S Ct 2140, 29 L Ed 2d 822 (1971). They have also been discussed in the debates of Congress as they evolved into their present form.

That there have been no cases challenging these statutes indicates the ultimate chilling effect of a law directly prohibiting the procurement and publication of certain material. In general, these statutes read in the context of the espionage acts seem to require that the photographer have scienter, the intent and probable knowledge, that his action would injure the United States and aid a foreign government. If a photographer or editor was aware that a picture contained defense property with the proscribed classification and published it, prosecution under the "photographic statutes" (18 USC 795-7) would probably ensue.

In New York Times v United States, supra, these statutes were used in dicta to explain why 'communicate' did not mean 'publication' in the other sections of the espionage act. In its decision, the Supreme Court found that the United States had not met the "heavy presumption against the constitutional validity" of prior restraint. However, the majority of justices did not rule out all prior restraint or subsequent punishment for unauthorized disclosure of information potentially damaging to the security of the country. In separate opinions, Justices Marshall, White, Stewart, Berger, and Blackmun all specifically mentioned the possibility of subsequent punishment.

Mr. Justice White's opinion specifically noted that in 1917 Congress had refused in the Espionage Acts to grant broad censorship powers to the President in time of war (55

(55 CR 2008-9) and had added an anti-censorship proviso in 1950 to the McCarran Act (50 USC Chapter 23). However, he pointed out that the Espionage Statutes themselves had been construed to permit conviction under them once publication had occurred. He specifically cited Sections 797 and 798 (18 USC), which make it a crime to publish certain information that is classified. He then wrote:

> If any of the material here at issue is of this nature, the newspapers are presumably now on full notice of the position of the United States and must face the consequences if they publish. I would have no difficulty in sustaining convictions under these sections [photographic statutes] on facts that would not justify the intervention of equity and the imposition of a prior restraint. (New York Times v U.S. supra at 736-7)

Mr. Justice White thus took the position that a conviction under these statutes was possible even though a case for enjoining the publication of the materials in the first place could not be sustained.

It is clear in these discussions that the Justices believed that publication of classified material must occur before a court can take action except in extreme circumstances such as those outlined by Justice Holmes. A court might act "when a nation is a war" during which time "no one would question but that a government might prevent actual obstruction to its recruiting service or the publication of sailing dates of transports or the number and location of troops." Schenck v United States, 294 US 47, 52 (1919), repeated in Near v Minnesota, 283 US 697, 716 (1931).

Mr. Justice Brennan goes so far to outline that the "grave and irreparable danger" standard that the government was attempting to impose should include "government allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to emperiling the safety of a transport already at sea (to) support even the issuance of an interim restraining order." (New York Times v U.S. supra, at 726)

The justices have indicated that a much lesser standard is required to convict a transgressor after publication. This standard is used when the statutes under discussion do not directly prohibit publication. It seems that if the espionage statutes ensure subsequent punishment when national security is emperiled, that the actual ban on publication per se in 18 USC 797 could be interpreted as overbroad and perhaps, even in violation of the First Amendment. In any case, it seems that this statute and its interpretation goes further and gives a greater restriction to news in photographic form than to news in print form.

In this climate, the photographic statutes take on a chilling effect guaranteed to freeze even the most innocent action.

§ 795. Photographing and sketching defense installations

(a) Whenever, in the interests of national defense, the President defines certain vital military and naval installations or equipment as requiring protection against the general dissemination of information relative thereto, it shall be unlawful to make any photograph, sketch, picture, drawing, map, or graphical representation of such vital military and naval installations or equipment without first obtaining permission of the commanding officer of the military or naval post, camp, or station, or naval vessels, military and naval aircraft, and any separate military or naval command concerned, or higher authority, and promptly submitting the product obtained to such commanding officer or higher authority for censorship or such other action as he may deem necessary.

(b) Whoever violates this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(June 25, 1948, ch. 645, 62 Stat. 737.)

Ex. Ord. No. 10104. Definitions of Vital Military and Naval Installations and Equipment

Ex. Ord. No. 10104, Feb. 1, 1950, 15 F.R. 597, provided:

Now, therefore, by virtue of the authority vested in me by the foregoing statutory provisions, and in the interests of national defense, I hereby define the following as vital military and naval installations or equipment requiring protection against the general dissemination of information relative thereto:

1. All military, naval, or air-force installations and equipment which are now classified, designated, or marked under the authority or at the direction of the President, the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force as "top secret", "secret", "confidential", or "restricted", and all military, naval, or air-force installations and equipment which may hereafter be so classified, designated, or marked with the approval or at the direction of the President, and located within:

(a) Any military, naval, or air-force reservation, post, arsenal, proving ground, range, mine field, camp, base, airfield, fort, yard, station, district, or area.

(b) Any defensive sea area heretofore established by Executive order and not subsequently discontinued by Executive order, and any defensive sea area hereafter established under authority of section 2152 of title 18 of the United States Code.

(c) Any airspace reservation heretofore or hereafter established under authority of section 4 of the Air Commerce Act of 1926 (44 Stat. 570; 49 U.S.C. 174) except the airspace reservation established by Executive Order No. 10092 of December 17, 1949.

(d) Any naval harbor closed to foreign vessels.

(e) Any area required for fleet purposes.

(f) Any commercial establishment engaged in the development or manufacture of classified military or naval arms, munitions, equipment, designs, ships, aircraft, or vessels for the United States Army, Navy, or Air Force.

2. All military, naval, or air-force aircraft, weapons, ammunition, vehicles, ships, vessels, instruments, engines, manufacturing machinery, tools, devices, or any other equipment whatsoever, in the possession of the Army, Navy, or Air Force or in the course of experimentation, development, manufacture, or delivery for the Army, Navy, or Air Force which are now classified, designated, or marked under the authority or at the direction of the President, the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force as "top secret", "secret", "confidential", or "restricted", and all such articles, materials, or equipment which may hereafter be so classified, designated, or marked with the approval or at the direction of the President.

3. All official military, naval, or air-force books, pamphlets, documents, reports, maps, charts, plans, designs, models, drawings, photographs, contracts, or specifications which are now marked under the authority or at the direction of the President, the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force as "top secret", "secret", "confidential", or "restricted", and all such articles or equipment which may hereafter be so marked with the approval or at the direction of the President.

This order supersedes Executive Order No. 8381 of March 22, 1940, entitled "Defining Certain Vital Military and Naval Installations and Equipment."

§ 796. Use of aircraft for photographing defense installations

Whoever uses or permits the use of an aircraft or any contrivance used, or designed for navigation or flight in the air, for the purpose of making a photograph, sketch, picture, drawing, map, or graphical representation of vital military or naval installations or equipment, in violation of section 795 of this title, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(June 25, 1948, ch. 645, 62 Stat. 738.)

§ 797. Publication and sale of photographs of defense installations

On and after thirty days from the date upon which the President defines any vital military or naval installation or equipment as being within the category contemplated under section 795 of this title, whoever reproduces, publishes, sells, or gives away any photograph, sketch, picture, drawing, map, or graphical representation of the vital military or naval installations or equipment so defined, without first obtaining permission of the commanding officer of the military or naval post, camp, or station concerned, or higher authority, unless such photograph, sketch, picture, drawing, map, or graphical representation has clearly indicated thereon that it has been censored by the proper military or naval authority, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(June 25, 1948, ch. 645, 62 Stat. 738.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 5 section 8312; title 38 section 3505.

§ 798. Temporary extension of section 794[1]

The provisions of section 794 of this title, as amended and extended by section 1(a)(29) of the Emergency Powers Continuation Act (66 Stat. 333), as further amended by Public Law 12, Eighty-third Congress, in addition to coming into full force and effect in time of war shall remain in full force and effect until six months after the termination of the national emergency proclaimed by the President on December 16, 1950 (Proc. 2912, 3 C.F.R., 1950 Supp., p. 71), or such earlier date as may be prescribed by concurrent resolution of the Congress, and acts which would give rise to legal consequences and penalties under section 794 when performed during a state of war shall give rise to the same legal consequences and penalties when they are performed during the period above provided for.

(Added June 30, 1953, ch. 175, § 4, 67 Stat. 133.)

REFERENCES IN TEXT

Section 1(a)(29) of the Emergency Powers Continuation Act (66 Stat. 333) as further amended by Public Law 12, Eighty-third Congress, referred to in the text, was formerly set out as a note under section 791 of this title and was repealed by section 7 of act June 30, 1953.

Proc. 2912, 3 C.F.R., 1950 Supp., p. 71, referred to in the text, is an erroneous citation. It should refer to Proc. 2914 which is set out as a note preceding section 1 of Appendix to Title 50, War and National Defense.

CANAL ZONE

Applicability of section to Canal Zone, see section 14 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 14 of this title; title 5 section 8312.

§ 799. Violation of regulations of National Aeronautics and Space Administration

Whoever willfully shall violate, attempt to violate, or conspire to violate any regulation or order promulgated by the Administrator of the National Aeronautics and Space Administration for the protection or security of any laboratory, station, base or other facility, or part thereof, or any aircraft, missile, spacecraft, or similar vehicle, or part thereof, or other property or equipment in the custody of the Administration, or any real or personal property or equipment in the custody of any contractor under any contract with the Administration or any subcontractor of any such contractor, shall be fined not more than $5,000, or imprisoned not more than one year, or both.

(Added Pub. L. 85-568, title III, § 304(c)(1), July 29, 1958, 72 Stat. 434.)

CODIFICATION

Section was added by subsec. (c)(1) of section 304 of Pub. L. 85-568. Subsecs. (a) and (b) of section 304 are classified to section 2455 of Title 42, The Public Health and Welfare. Subsec. (d) of section 304 is classified to section 1114 of this title. Subsec. (e) of section 304 is classified to section 2456 of title 42.

CANAL ZONE

Applicability of section to Canal Zone, see section 14 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 14 of this title.

[1] So enacted. See first section 798 enacted on Oct. 31, 1951, set out above.

CHAPTER 39—EXPLOSIVES AND OTHER DANGEROUS ARTICLES

Sec.
831. Definitions.
832. Transportation of explosives, radioactive materials, etiologic agents, and other dangerous articles.
833. Marking packages containing explosives and other dangerous articles.
834. Regulation by Interstate Commerce Commission.
835. Administration.
836. Transportation of fireworks into State prohibiting sale or use.
[837. Repealed.]

AMENDMENTS

1970—Pub. L. 91-452, title XI, § 1106(b)(2), Oct. 15, 1970, 84 Stat. 960, struck out item 837.

1960—Pub. L. 86-710, Sept. 6, 1960, 74 Stat. 808, substituted "Other Dangerous Articles" for "Combustibles" in the chapter heading, "explosives, radioactive materials, etiologic agents, and other dangerous articles" for "dynamite, powder and fuses" in item 832, "Marking packages containing explosives and other dangerous articles" for "Transportation of nitroglycerin" in item 833, "Regulation by Interstate Commerce Commission" for "Marking packages containing explosives" in item 834, and "Administration" for "Regulations by Interstate Commerce Commission" in item 835.

Pub. L. 86-449, title II, § 204, May 6, 1960, 74 Stat. 88, added item 837.

1954—Act June 4, 1954, ch. 261, § 2, 68 Stat. 171, added item 836.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 7 section 136q; title 33 section 1507; title 49 section 1811.

§ 831. Definitions

As used in this chapter—

Unless otherwise indicated, "carrier" means any person engaged in the transportation of passengers or property by land, as a common, contract, or private carrier, or freight forwarder as those terms are used in the Interstate Commerce Act, as amended, and officers, agents, and employees of such carriers.

"Person" means any individual, firm, copartnership, corporation, company, association, or joint-stock association, and includes any trustee, receiver, assignee, or personal representative thereof.

"For-hire carrier" includes common and contract carriers.

"Shipper" shall be construed to include officers, agents, and employees of shippers.

"Interstate and foreign commerce" means commerce between a point in one State and a point in another State, between points in the same State through another State or through a foreign country, between points in a foreign country or countries through the United States, and commerce between a point in the United States and a point in a foreign country

[1] The present definitions of these terms are:

1-501 "Top Secret"
"Top Secret" shall be applied only to information or material the unauthorized disclosure of which could reasonably be expected to cause exceptionally grave damage to the national security. Examples of "exceptionally grave damage" include armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; the compromise of vital national defense plans or complex cryptologic and communications intelligence systems; the revelation of sensitive intelligence operations; and the disclosure of scientific or technological developments vital to national security.

1-502 "Secret"
"Secret" shall be applied only to information or material the unauthorized disclosure of which could reasonably be expected to cause serious damage to the national security. Examples of "serious damage" include disruption of foreign relations significantly affecting the national security; significant impairment of a program or policy directly related to the national security; revelation of significant military plans or intelligence operations; and compromise of significant military plans or intelligence operations; and compromise of significant scientific or technological developments relating to national security.

1-503 "Confidential"
"Confidential" shall be applied to information or material the unauthorized disclosure of which could reasonably be expected to cause identifiable damage to the national security. Examples of "identifiable damage" include the compromise of information that indicates strength of ground, air, and naval forces in the United States and overseas areas; disclosure of technical information used for training, maintenance, and inspection of classified munitions of war; revelation of performance characteristics, test data, design, and production data on munitions of war.

(AR 380-5)

Trespass Statute

The second statute that affects photographers in military areas is also in the United States Criminal Code at 18 USC 1382. Originally drafted as part of the 1909 revision of the penal code, it reads:

> §1382. Entering military, naval or Coast Guard property
>
> Whoever, within the jurisdiction of the United States, goes upon any military, naval or coast guard reservation, post, fort, arsenal, yard, station or installation, for any purpose prohibited by law or lawful regulation;
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof --
>
> Shall be fined not more than $500 or imprisoned not more than six months, or both.
>
> (June 25, 1948, ch. 645, 62 Stat. 765)

This law would not seem to affect press photographers because covering the news on federal property with a camera would not seem to be unlawful. However, a series of cases interpreting this law have inserted a "catch-22" into the law. First, because regulations forbidding entry to military bases are "lawful regulations," even entering an unposted military area without permission could violate this statute. Second, photographing defense property is against the law in itself. So one who goes into a military area with the intent to make a photograph could be in violation of this statute.

In addition, the barring regulation does not have to be published in the Federal Register but may only be posted in prominent places at the base to be lawful. Thus, entry onto a base without permission or with the intent to make photographs may be "for purposes prohibited by law or lawful regulation."

This statute was enacted in 1909 "at the urgent request of the Department of War" to prevent the entry of pimps and spies onto military land. (House Report 61-1329) The statute has been interpreted in a series of cases involving protestors who were demonstrating about peace or environmental issues. These cases have established that "open" bases may be entered without violating the statute, but "closed" or posted military areas and certain designated harbors may not be entered without permission of appropriate authorities.

Patterns in the History

An examination of the history and case law interpreting these statutes may provide an insight into how an actual prior restraint on publication of photographs and specific regulations against cameras came to be the law. Some patterns emerge from these histories.

One natural line is created by the tension between First Amendment rights and the needs of national security. In this case it seems to run along property lines. Security prevails anywhere the military has control of the actual space. Area commanders can prohibit entry and re-entry, conduct search of persons, and seizure of film, and actually prohibit cameras. The First Amendment prevails outside military reservations where control rests in the hands of civilian law enforcement officials and, if necessary, the injunctive power of judges.

A second pattern seems to manifest the Siebert principle, that the press is least free when the security of the country is most threatened.[2] Major encroachments on freedom of camera coverage and entry were made in 1938, 1942 and 1953, years when the national sense of security was at low ebb.

A third pattern arising from the study of this history of encroaching restraint gives an understanding of how a small pressure group can create a strand of law without Congress realizing what is happening. The original version of

the military trespass law was added by a committee, at the request of the Secretary of War, to the 1909 recodification of the penal code. It was passed as part of a massive recodification bill which was understood to be a reordering of laws already carefully considered and passed by Congress. The birth of the photographic statutes came when the Congress was urged to pass an official secrets act to prevent spying in peacetime. They were made more severe in a series of acts spanning thirty years until the present situtation where they are read as the most severe prior restraint acts on the books.[3] The guideline arising from the third pattern might be that national security gains the balance when Congress delegates its authority, and vigilance is necessary at recodification time.

That the practice of making changes in the rewriting and recodification of laws has not changed is indicated by a series of alarming proposals in the Criminal Justice Reform Act of 1975 which attempted to remove the intent clause from the espionage acts. This foray was documented in an article by David Crystal in a 1975 Law Review article.[4]

Congress may see no need to remove the intent clause from the photographic statutes because, as presently interpreted by the Supreme Court in New York Times v United States, supra, and in the Edgar and Schmidt treatise, supra, they already require no intent to injure the United States to

convict. But, an examination of the legislative history of these statutes would seem to indicate otherwise.

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[2]Siebert, Frederick S., Freedom of the Press in England 1476-1776 (Urbana: University of Illinois Press, 1952)

[3]Edgar, Harold and Benno Schmidt, Jr., "The Espionage Statutes and the Publication of Defense Information," Columbia Law Review, Vol. 73, 1973, pp. 1069.

[4]Crystal, David, "The Proposed Criminal Justice Reform Act of 1975: A Civil Liberties Critique," Seton Hall Law Review, Vol. 6 (Summer, 1975) pp. 591-643.

HISTORY OF 18 USC §§795-797

1911

In 1911, the forerunner of the espionage statute, "An Act to Prevent Disclosure of National Defense Secrets," was passed by the 61st Congress. The House Report (61-1942) accompanying the bill (H.R. 26656) detailed the need for such legislation by recounting actual attempts at espionage in the previous years that were not prosecuted. The introduction to the bill read:

> The effect of this bill is to protect the nation against spying in time of peace.
>
> The necessity for such protection has increased with the growing importance of national preparation for war in time of peace.
>
> The issues of most modern wars have been settled quickly by reason of the preparation of the belligerents, notably the Russo-Japanese War, the Franco-German War, the Austrian-Prussian War. In this contest of preparations the question of knowledge on the part of the enemy is of vital importance, particularly in the case of the location of forts, of batteries, of mines and torpedoes. Such knowledge may indeed actually settle the contest.
>
> To prevent the acquisition of this information, nearly all of the nations of the world with any developed system of national defense, except the United States, have upon their statute books stringent laws under which they can restrain and to a degree prevent spying by inflicting punishment upon persons found guilty. America alone has no such law and our national-defense secrets as a consequence have no protection against spies. Again and again such spies have been caught obtaining dangerous secret information of our defenses and nothing could be done. Caught in

other lands they have been severely punished. Caught in America and in our possessions they have been set at liberty without punishment.

The imperative need of action without further delay is shown in the great activity of foreign spies in the last few years, particularly on our Pacific coast and insular possessions. More than a score of cases have been reported to the Government since January 1, 1907. (61-1942)

The bill passed with a minimum of debate on the unanimous consent calendar. The debate itself is interesting in that one theme, worry about innocent photographers being prosecuted, was struck in this debate and repeated in every discussion of this issue for the next thirty years. One representative would ask if this bill applied to innocent citizens. Then, the House would add an intent clause. In this bill they added information as to national defense "to which he is not lawfully entitled." Then a second question arose, could an innocent tourist violate this statute? In this debate the reply was, "I'm inclined to think not; in any case it is a very small penalty...." The response was, "I think we ought to pass with some hesitation a bill which makes an innocent act of a person a crime." Then the bill was passed, 47 CR 2030 (1911).

The bill itself said that anyone who "for the purpose of obtaining information respecting the national defense to which he is not lawfully entitled" goes upon or near any military property and without proper authority

"takes or makes any document, sketch, photograph, photographic negative, plan or model or defense knowledge, or obtains same or attempts to communicate same will be fined not more than $1,000 and or imprisoned not more than one year." Communication of same to a foreign government brought a penalty of not more than ten years imprisonment. (36 Stat. 1084 Mar. 3, 1911)

This 1911 act was repealed on June 17, 1917, as part of the enactment of the stronger Espionage Act. This statute provided penalties of $10,000 and two-year imprisonment for simple violation and 20-year imprisonment for communication to a foreign government in time of peace. In time of war the penalty became death or imprisonment of thirty years. It forbade anyone to make, induce another to make, to turn over or not to deliver on demand of the government any "sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing or note of anything connected with the national defense." (PL 24, June 17, 1917, 65th Congress)

The penalties were provided for:

> "whoever for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advance of any foreign nation, goes upon, enters, flies over or otherwise obtains information concerning [national defense installations or information]. [65th Congress, P.L. 24 (1917)]

This statute clearly required the intent to injure the United States to sustain a conviction. The debate over the total Espionage Act was long and acrimonious and the photographic statutes were not discussed.

1935

In 1935, Sen. Park Trammel, Democrat-Florida, chairman of the Senate Naval Affairs Committee, introduced a bill entitled "To Prohibit the Making of Photographs, Sketches or Maps of Vital Military and Naval Defensive Installations and Equipment and for other purposes" at the urgent request of the Secretary of the Navy. The bill passed the Senate but did not reach final reading in the House, due, apparently, to the death of Sen. Trammel on May 8, 1936.

1938

The bill came back in even stronger form in January of 1937. This bill was close to the present form of the statute. It made it a crime to make a picture or sketch of any installation specifically designated by the President as needing protection (read "classified" in modern terms) without first obtaining the permission of the commanding officer and subsequently submitting the work for censorship. There was no protection in this bill for the citizen with innocent intent. In fact, the bill was intended to prevent

those persons from making pictures just as the espionage acts prevented those with hostile intent.

The House Report stated that

> The committee is of the opinion that this measure is necessary to prevent important facts regarding our national defense installations from falling into the possession of persons, who through ignorance of their significance, or hostile intent, would permit them to be used to the detriment of the United States.

The report quoted a letter from Harry H. Woodring, Secretary of War, stating that the purpose of the bill was to control innocent photography.

> Enactment of this proposed legislation will permit more effective control of the activities of free-lance motion picture and still-picture operators in vital military and naval installations, where the intent of the photographer is not necessarily so flagrant as that contemplated under [The Espionage Act]. . (House Report 75-1650)

During the debate on this bill its supporters were quite devious. They attempted to have their fellows believe that there was no previous statute and/or the previous bill did not apply to the outlying possessions, which it did. The bill was represented as providing a penalty for making photographs as the other one did not, which was untrue. The new bill did extend legal penalties to innocent citizens who took photographs without permission, however. Also, it was at this time that the word "publish" appeared in the statute, although there was no debate on it at that time or later. It seems to replace the term "communicate" in the original statute.

(81 CR 5239-9548). This 1938 bill was then codified separately from the Espionage Act in 50 USC 45 (a-d), 53 Stat. 3 & 4.) (A copy is provided at the end of this section.)

1940

In 1940, the Espionage Act penalties were stiffened. The 76th Congress amended 50 USC Supp 31 and increased the penalties for peacetime violations of the act from a possible two to ten years imprisonment. The fine was kept at $10,000 maximum. (76th Congress, P.L. 433, March 28, 1940)

1948

On June 25, 1948, the espionage statutes were repealed (62 Stat 862) and their provisions were moved from Title 50 War and National Defense to Title 18 United States Criminal Code as part of a massive recodification and revision of that act. The laws were rewritten and criminal provisions from other titles were consolidated into this one. Thus the final form of the "photographic statutes" appear in 18 USC 795, 6 and 7 (62 Stat. 737-8).

1942

There was a slight detour, however. In June 1942, six months after Pearl Harbor, a more sweeping bill to prevent photography of military areas was proposed and passed by Congress. The bill (53 Stat. 390-1) became 50 USC 781-5 and should have lapsed in 1978 (see pages 24-5).

Regarded as supplementary to the Espionage Act and the 1938 bill, the 1942 act forbade the making of any sketch or photograph of any national defense property or that of any national defense contractor. Section 782 allowed the Secretary of the Army or Navy to permit same "when the interests of national defense will not be adversely affected thereby." Section 783 provided the penalty of one year imprisonment and or a fine of $1,000.

This act did not discriminate between classified and unclassified material and was intended to circumvent the intent requirements introduced in earlier legislation. The House report on June 1, 1942, recommended passage of the bill. The report said,

> The act is designed to increase protection against espionage. Frequently, photographers, having no intention to injure the United States or to aid a foreign nation, make photographs of certain vital installations which are later published or otherwise made available to the general public. Such dissemination of this vital information makes it likewise available to enemy agents within the United States, and such information in the hands of the enemy may prejudice our war effort. (House Report 77-2189)

The report further said that the problem with the previous legislation was that the espionage act required proof of intent to injure the United States <u>even when publication occurred</u> and that the 1938 bill was too narrow because it restricted the prohibition to classified material. The report quoted extensively from a letter from Secretary of

War Henry L. Stimson in support of the bill. The report said:

> The Espionage Act which requires the actual proof of intent to injure the United States or to aid a foreign nation in order to obtain a conviction does not handle the problem of the innocent photographer who photographs with no intent to injure the United States or aid a foreign nation, but publishes his photographs, thereby injuring the war effort. The act of January 12, 1938 (supra), is too narrow in its aspects to allow the President to define an entire military or naval reservation as requiring protection against the general dissemination of information relative thereto.
> (House Report 77-2189)

The discussion of the Espionage Act in the House Report (77-2189) above coupled with the 1938 House Report (75-1650) which indicated that bill covered conditions "where intent is not so flagrant as in Sect I, P.C. 2 & 65th Congress (The Espionage Act)," makes it clear that Congress and the office of the Secretary of Defense believed that the intent to injure the United States clause directly applied to the "photographic statutes" whether publication occurred or not.

It is also clear that the Defense Department wanted to remove the need to prove intent from the 1942 version. For this reason, several members of the Senate objected to the bill in a debate that ran over several days. The compromise brought forth a fifth section of the bill which limited its provisions to World War II. However, the bill survived until 1978 and the 1981 edition of the United States Code has not recognized its demise.

The 1942 bill was introduced by Sen. Reynolds as chairman of the Committee on Military Affairs. It was objected to on four separate occasions by other Senators. Sen. Andrews finally presented an amendment which became Section 5 (87 CR 5239). This amendment made this bill "effective only for the duration of the present war as determined by proclamation of the president" at which point the bill passed the Senate as amended (87 CR 9703).

The bill was returned to the House and certain passages considered necessary by the Navy were added. The amended bill passed the House (88 CR 5239) and became Public Law 627 in 1942 (56 Stat. 390)

1953

A series of emergency power extension acts extended the life of this statute into 1953. Then the statute itself was amended by deleting the words "for the duration of the present war as determined by the proclamation of the president" and inserting instead the words "until six months after the termination of the national emergency proclaimed by the President on December 16, 1950 (Proc. 2914, 3 C.F.R., 1950 Supp., p.71)"; (P.L. 46 (67 Stat. 41) June 4, 1953)

Presidential proclamation 2914 of December 16, 1950 has its own history and was never specifically repealed in the terms of any bill. As late as February 3, 1968 an Attorney General's Opinion ~~(No. M2)~~ declared that particular

(1968AG42)

emergency still in existence. However, a 1970 bill (Public Law 94-412, Title I Section 101, of September 14, 1976 (90 Stat. 1255)) enacted a sweeping termination of all "existing declared emergencies" to take effect on September 14, 1978, two years after enactment. (50 USC 1601) The total legislation specifically amended, repealed, and saved from effect certain sections of the United States Code. Unfortunately, the entire act never mentions presidential proclamation 2914 of 1950 nor is 56 Stat. 390 or 50 USC 781-785 mentioned. It is however mentioned in the accompanying House Report to the above bill. House Report 94-238 which accompanies House Resolution 3884 (National Emergencies Act) mentions the 1950 declaration of President Truman in a context which indicates that it is expected to be encompassed by the bill. The analysis of the bill reads:

> The purpose of the proposed legislation, as amended, is to terminate all powers and authorities under any national emergency existing on the date of enactment as of two years from that date....

On the same page four paragraphs further down, the analysis states that "Presently, the national emergency declared on December of 1950 by President Truman in connection with the Korean conflict is in effect." (HR 94-238, p. 2) These two statements made in the introductory section of the analysis indicate that it was intended that the Presidential Proclamation 2914 was terminated by this legislation. This, in turn, would mean 50 USC 781-785 would have lapsed in 1978.

A second question arises as to whether the legislation or the Department of Defense actually wished this specific section of the code to be terminated. An extensive letter from Martin R. Hoffman of the Department of Defense to Hon. Peter W. Rodino Jr. in response to a request for commentary on the bill made no mention of that section of the code. The letter closes with a statement that seems to indicate that they did not wish to save it.

> In general, the Department of Defense is in accord with S.3957 goal of repealing obsolete or unnecessary emergency laws. Therefore, subject to the foregoing reservations and recommendations, this Department does not object to enactment of S.3957. (House Report 94-238, p. 32-33)

Thus, we see the evolution of the statute as:

1911 - Provision against photographing military areas with intent to injure the U.S.

1917 - Stronger act, higher penalties and addition of "reason to believe" clause to the intent section.

1938 - Ban on photographing classified property without both prior permission and subsequent censorship of product.

1942 - Blanket ban on any photography without military permission. Set to lapse after WWII - continued until 1978.

1948 - The 1938 statute was moved from Title 50 to Penal Code (Title 18) as part of recodification process.

It was mentioned earlier that the 1938 and 1942 House Reports indicated that the Espionage Act and the Photographic Statutes required intent to injure the United States. Yet Mr. Justice White in New York Times v United States supra, and Edgar and Schmidt (supra), stated that publication of photographs of classified material per se was the crime prohibited. One would normally resort to case law for further light on the question. However, there is no case law on this point that cites these statutes.

The dilemma remains, the legislative history reads the photographic statutes in the context of the entire espionage act while modern readers believe they stand alone.

1938
75th C.

PUBLIC LAWS

ENACTED DURING THE

THIRD SESSION OF THE SEVENTY-FIFTH CONGRESS

OF THE

UNITED STATES OF AMERICA

Begun and held at the City of Washington on Monday, January 3, 1938, and adjourned without day on Thursday, June 16, 1938

FRANKLIN D. ROOSEVELT, President; JOHN N. GARNER, Vice President; KEY PITTMAN, President of the Senate *pro tempore;* WILLIAM B. BANKHEAD, Speaker of the House of Representatives.

[CHAPTER 2]

AN ACT

To prohibit the making of photographs, sketches, or maps of vital military and naval defensive installations and equipment, and for other purposes.

January 12, 1938
[S. 1445]
[Public, No. 418]

Military and naval defenses.
Definition of vital installations, etc., requiring protection.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, whenever, in the interests of national defense, the President shall define certain vital military and naval installations or equipment as requiring protection against the general dissemination of information relative thereto, it shall be unlawful to make any photograph, sketch, picture, drawing, map, or graphical representation of such vital military and naval installations or equipment without first obtaining permission of the commanding officer of the military or naval post, camp, or station concerned, or higher authority, and promptly submitting the product obtained to such commanding officer or higher authority for censorship or such other action as he may deem necessary. Any person found guilty of a violation of this section shall upon conviction be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

Unauthorized photographs, etc., declared unlawful.

Censorship.

Penalty for violation.

Use of aircraft.

SEC. 2. Any person who uses or permits or procures the use of an aircraft for the purpose of making a photograph, sketch, picture, drawing, map, or graphical representation of vital military or naval installations or equipment, in violation of the preceding section, shall be liable to the penalty therein provided.

Unauthorized reproduction of plans, etc., declared unlawful.

SEC. 3. On and after thirty days from the date upon which the President defines any vital military or naval installation or equipment as being within the category contemplated under the first section of this Act, it shall be unlawful for any person to reproduce, publish, sell, or give away any photograph, sketch, picture, drawing, map, or graphical representation of the vital military or naval installations or equipment so defined, without first obtaining permission of the commanding officer of the military or naval post, camp, or station concerned, or higher authority, unless such photograph, sketch, picture, drawing, map, or graphical representation has clearly indicated thereon that it has been censored by the proper military

Censorship.

Penalty for violation.

or naval authority. Any person found guilty of a violation of this section shall upon conviction be punished as provided in the first section of this Act.

Terms defined.

SEC. 4. The term "aircraft" as used in this Act means any contrivance known or hereafter invented, used, or designed for navigation or flight in the air. The expression "post, camp, or station" as used in this Act shall be interpreted to include naval vessels, military and naval aircraft, and any separate military or naval command.

Scope of Act.

SEC. 5. The provisions of this Act shall extend to all Territories, possessions, and places subject to the jurisdiction of the United States, whether contiguous thereto, or not and offenses under this Act when committed upon or over the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States and outside the territorial limits thereof shall be punishable hereunder.

Approved, January 12, 1938.

HISTORY OF 18 USC 1382

The question of intent has been more closely examined in the case law relating to the trespass statute 18 USC 1382. The history of 1382 is much shorter but the case line is very long.

The basic authority for 18 USC 1382 is in Article I, Section 8, Clause 17 of the United States Constitution which reads in part:

> Congress shall have the power to *** provide for the common defense and general welfare of the United States *** [and] To exercise exclusive legislation in all cases *** and to exercise like authority over all places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards and other needful buildings --

As mentioned above, the military trespass statute was an addition to 1909 recodification of the Criminal Code. In Chapter 47 "Crimes against the Government" a new section was added. Originally it was section 47 but in the final version it became section 45. The lengthy explanation of the revision had a one paragraph notation on the section.

> Section 47: This section is new. It was strongly recommended by both the War Department and the Department of Justice. It is but an extension of the provisions of the previous section [which read: "Whoever shall willfully trespass upon, injure or destroy" (military property shall be fined $5,000 or imprisoned not more than five years, or both)], and is designed to punish persons who, having been ejected from a fort, reservation, etc. return for the purpose of obtaining information respecting the strength, etc. of the fort, etc. or for the purpose of inducing men to visit saloons, dives and similar places. Such persons may now go upon forts and reservations repeatedly for such purposes and there is no law to punish them. (Senate Report 60-10)

The section was passed with the entire recodification on March 4, 1909 (35 Stat. 1097). It was expanded to include the Navy in 1910 and on March 28, 1940, the section entitled "Unlawful Entry on Military Reservations" was made applicable to outlying possessions of the United States. (54 Stat. 80)

Another section was added to this Chapter 67 "Military and Navy," on March 21, 1942 (56 Stat. 173). The new section 1383 "Restrictions in Military Areas and Zones" was enacted to control aliens in presidentially designated areas. This was the basis for the massive alien detention system set up on the Pacific Coast and for many other denials of due process during World War II. It was recently repealed but appears in many cases linked with its enabling Executive Order No. 9066 of February 19, 1942, and 18 USC 1382. These cases will not be discussed because 18 USC 1383 has been repealed. The trespass statute (18 USC 1382) is of importance to photojournalists because they must be present to cover the news and their rights are generally those of the public. There have been no cases where direct challenge to the constitutionality of the statute itself was allowed and only one case which considered the issue as relating to journalists, Weissman v United States, 387 F2d 271 (1967 CA 10 Okla). The majority of the case law relating to this statute is based on the right of demonstrators to enter and remain on military bases.

In general, case law has divided the statute into two issues. The first is the question of initial entry and the second is the question of re-entry. The re-entry question is more easily settled. Holdridge v United States, 282 F2d 302 (CA8 1960) has separated the two issues of entry and re-entry and held that re-entry after notice comes under a specific classification of act that deals with policy and deals a small penalty and therefore intent may be properly omitted as an element of the offense (supra, at 310).

Relief from an order not to re-enter may come from the courts in the form of an injunction or summary judgment. Specifically, entry onto an open post for the purpose of handing out leaflets has been allowed. Flower v United States, 452 F2d 80 (CA5 1971). The only case which mentions journalists upheld the reentry provision. The court ruled that the Commander had the power to exclude private persons if the order was rational (not arbitrary and capricious) and was "in the interests of good order and military discipline". Weissman v United States, 387 F2d 271 (1967) at 273.

Other cases which have reversed conviction of re-entry in violation 18 USC 1832 have done so on the basis that (a) proper notice not to reenter had not been given by the person in command, United States v Ramiraz Seijo, 281 F Supp 708 (1968), and (b) the United States did not establish sole title to the land. United States v Watson, 80 F Supp 649 (DCED Va) .

The questions of law in the case of first entry onto a military area are less clear.

A military commander does have the power to make regulations that exclude citizens from a military area and he has the power summarily to exclude civilians from an installation without violating the due process clause. Cafeteria and Restaurant Workers v McElroy, 367 US 886, 6 L Ed 2d 1230, 81 S Ct 1743 (1961). This power has not been upheld where the order was arbitrary or capricious and an injunction has been requested Jenness v Forbes 351 F Supp 88 (1972) or in cases where the post was open (not posted) and the behavior was not in violation of a specific regulation, United States v Flower supra.

In one unusual case, a group of demonstrators was detained, searched, and barred from the base during a visit of the president to a base in Hawaii. The base had been declared open to the public to "welcome the president." The judge held that damages for deprivation of First Amendment rights would be recoverable by the demonstrators, if the United States consented to be sued,-- which it did not. He also held that the bar-letters issued to the demonstrators were not libelous per se under Hawaii law and he did not rule on the question of the base personnel having immunity for their actions.

The result of this case for the demonstrators was that they were effectively barred from speaking to the president in the form of a demonstration with placards, although friendly crowds were allowed to hear his speech. As there is no following case of record it also seems that the base commander did not suffer from this action. Butler v United States, 365 F Supp 1035 (1973).

The situation of the Butler v United States demonstrators seems to relate to that of a news photographer covering a news event. If he or she were detained under the powers of a base commander, the photographic opportunity would be lost and little recourse would be offered.

A further question is whether a news photographer could be prosecuted for an initial entry to a base under 18 USC 1382. As there are no cases of record on this question one must return to the "demonstrator" case law.

The issue is what constitutes a punishable offense by the words "for any purpose prohibited by law or lawful regulation." These words have been interpreted slightly differently by our Federal Circuit Courts of Appeals. However, the most recent case seems to clarify the question. In 1960, Circuit Judge, now Supreme Court Justice, Blackmun held in Holdridge v United States, supra, that on the issue of first entry both purpose or motive to violate a statute or regulation and the fact that the prohibition existed and

was constitutional must be proved. He said "this interpretation affords some protection to the innocent trespasser." (Supra, at 309) However, this statement was dicta and not a holding.

Two cases, one in 1973 and one in 1978, followed Holdridge v United States and clearly established that where notice of lawful regulation was given, such as in the case of a closed (posted and entry restricted) base, that entry onto that base could be held as violation of 18 USC 1383. In other words, entry itself was unlawful when the defendant was aware of the regulation. United States v Floyd, 477 US F2d 217 (CA 10, 1973) and United States v Patz, 584 F 2d 929 (CA 9, 1978). In these cases the person would not be an "innocent" trespasser because notice was given.

In 1978 the statute itself was attacked for constitutionality on the basis of void-for-vagueness. In convoluted reasoning, the judge ruled that because the defendants had not applied for permission to enter, they had no standing to appeal their conviction under the first section of 18 USC 1382, United States v Mowat 582 F2d 1194 (CA 9, 1978) at 1201. In this case, defendants were convicted of violating 18 USC 1382 because they entered a military reservation knowing that the military had closed the area to civilians. The judge ruled that it was not necessary that the prohibition be published in the Federal Register,

if the defendants had knowledge of the rule and that knowingly breaking a regulation prohibiting entry was "a purpose prohibited by law or lawful regulation."

In May of 1981, First Circuit Court of Appeals Judge Levin H. Campbell clarified the issues raised in earlier cases in United States v Parrilla Bonilla, 648 F2d 1373 (CA 1, 1981) Campbell reversed a 18 USC 1382 conviction of defendants by ruling that:

> (1) requisite prohibited "purpose" under federal statute can consist of unauthorized entry itself and no specific intent, in the strict sense, to violate law or regulation prohibiting such entry need be shown; (2) when prosecution under federal statute proceeds on basis that defendant has entered restricted military reservation for the purpose of unauthorized entry, it must be shown that defendant had knowledge or notice that such entry was, in fact, prohibited; (3) knowledge that reservation has been closed to public cannot be inferred from mere fact that it was military installation upon which entry was made; and (4) regardless of reservation's "true" border, Government was bound for purposes of prosecution by borderline it established at trial which it conceded defendants were not shown to have passed.

In point three of this statement, "knowledge that (the) reservation has been closed to (the) public cannot be inferred from (the) mere fact that it was a military installation upon which entry was made," the question becomes, what is proper notice that an area is closed?

NOTICE REQUIREMENTS

It is clear that posted property is effective notice. Publication in the Federal Register or the Code of Federal Regulations is not necessary to make a regulation "lawful." It is only necessary that the citizen have proper notice. United States v Mowat, 582 F2d 1194 (CA 9, 1978) AR380-20 dated September 12, 1973, requires that areas be posted "except where such action would tend to advertise an otherwise concealed area." The signs should be posted at "conspicious and appropriate places such as ordinary entrances or approaches to these areas and on perimeter fences or boundaries of the area. The sign should read:

> Restricted Area Warning
> This (fort, range, plant, laboratory, etc.) has been declared a restricted area by authority of (Title: Commanding General, Commanding Officer, Officer in Charge) in accordance with the provisions of the directive issued by the Secretary of Defense on August 20, 1954, pursuant to the provisions of Section 21, Internal Security Act of 1950. Unauthorized Entry is Prohibited.
>
> All persons and vehicles entering hereon are liable to search. Photographing or making notes, drawings, maps or graphic representations of this area or its activities is prohibited unless specifically authorized by the commander. Any such material found in the possession of unauthorized persons will be confiscated.

This seems to be "actual and timely" notice of a regulation if it appears in a posted sign.

If the area is not posted as restricted or classified then the photographer cannot be considered to have had notice that photography was prohibited. However, in United States v Mowat (supra) notice was assumed because 1) the radio and newspapers had published that the area was closed and 2) the demonstraters were protesting the closure.

THE 18 USC 1382 STANDARD

Although precedents established by Circuit Courts of Appeal are not binding on one another, the standards set in these series of cases seem to be clear. On the question of first entry, if one knows the area is closed and enters anyway, one becomes subject to prosecution. If one has no knowledge of the restriction and the information is not published in the Federal Register, then one will probably not be prosecuted for first entry even though the area may be under military jurisdiction. Re-entry after a warning not to re-enter is punishable.

Of course, a way around this law is to gain permission from the commander to enter the reservation and to cover the news event, with or without subsequent censorship.

For all the discussion of "intent," this statute effectively ignores the issue of whether the visitor or trespasser intended to injure the United States or aid a foreign government. Because of the simplicity of the intent requirement, prosecution for unauthorized entry would probably come under this act.

Thus, it seems that the photographic statutes may require intent to injure the United States but the trespass statute does not. Taken together, these statutes form the base of a vast network of military regulations that affect photojournalists. Some of these are published in the Federal Register and CFR, some are not.

ANCILLARY STATUTES AND DIRECTIVES

Many of these regulations cite several other acts for their support in addition to 18 USC 1382 and 18 USC 795-7. Prosecution under these might attempt to prove intent to injure the United States and, if this was not possible, prosecution might fall back on the trespass and photographer statutes.

The most common of the acts and directives cited are:

50 USC 797 - The McCarran Act
DOD Directive 5200.8 of August 20, 1954 (19 FR 5446)
18 USC 2152 - "Fortification, harbor defenses or defensive sea areas"
18 USC 2384 - "Seditious Conspiracy"

In 1950, as part of the Cold War paranoia about Communism, Congress passed the Internal Security Act (The McCarran Act).[5] Two sections particularly affected photojournalists. The first raised the penalty of breaking any military law or regulation and did not seem to require intent to injure the United States. In essence, 50 USC 797 read:

> Whoever willfully shall violate any such regulation or order as, pursuant to lawful authority, shall be or has been promulgated or approved by the Secretary of Defense or by any military commander designated by the Secretary of Defense * * * for the protection or security of military or naval* * *(everything) * * *or otherwise providing for safeguarding the same against destruction, loss or injury by accident or by enemy action, sabotage or other subversive actions, shall be guilty of a misdemeanor and, upon conviction thereof, shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both.

In the same Act, Congress put restrictions on the Act and other security statutes by passing section 798, "Preservation of Certain Rights." It reads:

> Nothing in this chapter, sections 137 to 137.8, 156, 456, 457(b), 704, 705, 725, 729, 733, 734(b) and 735 of Title 8, sections 793 and 1507 of Title 18, and sections 611(c)(5) and 618(e) of Title 22 shall be construed to authorize, require or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated under said subchapter and sections, having that effect. September 23, 1950, Title I §1(b) 64 Stat 787.

This section would seem to protect the press from the harsher penalties of the McCarran Act if it published proscribed photographs. Note that the espionage section, 18 USC 793, is mentioned, but not the specific "photographic statutes." Thus, it can be concluded that this Act did not conflict with the ban on publication in 18 USC 797.

In addition, trespass or unauthorized entry does not come under the traditional definition of censorship which is usually defined as prior restraint. Thus, the harsher penalties of the McCarran Act did, and do, apply to trespass on military land.

In Department of Defense Directive 5200.8, 19 FR 5446, the Secretary of Defense designates the Commanders of all areas as lawful promulgators of military regulations and orders pursuant to the McCarran Act.

The two other sections, 18 USC 2152 and 2384, are copied below. 18 USC 2152 does not seem to require treasonous intent and 18 USC 2384 does.

§ 2152. Fortifications, harbor defenses, or defensive sea areas

Whoever willfully trespasses upon, injures, or destroys any of the works or property or material of any submarine mine or torpedo or fortification or harbor-defense system owned or constucted or in process of construction by the United States; or

Whoever willfully interferes with the operation or use of any such submarine mine, torpedo, fortification, or harbor-defense system; or

Whoever knowingly, willfully, or wantonly violates any duly authorized and promulgated order or regulation of the President governing persons or vessels within the limits of defensive sea areas, which the President, for purposes of national defense, may from time to time establish by executive order—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(June 25, 1948, ch. 645, 62 Stat. 799.)

§ 2384. Seditious conspiracy

If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than $20,000 or imprisoned not more than twenty years, or both.

(June 25, 1948, ch. 645, 62 Stat. 808; July 24, 1956, ch. 678, § 1, 70 Stat. 623.)

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[5] Kelly, Alfred H. and Winfred A. Harbison, The American Constitution, Origins and Development, 5th Ed., New York: W.W. Norton & Co., Inc., 1976, pp. 804, 827, 908-9, 1916.

MILITARY REGULATIONS

The essential document which regulates military relationships with all media is Army Regulation 360-5 (AR-360-5), issue date July 15, 1979, which details all policies and procedures related to military public information activities. The photographic regulations are reproduced in the appendix. Important companion works to the publications are:

--AR 380-20 defining procedures for maintaining "restricted areas." (Presently being revised, last issue date is September 12, 1973)

--AR 380-4 Department of Defense Building Security for the National Capitol Region, latest issue date November 9, 1972. This publication outlines security procedures for buildings in the nation's capitol. Media may be issued one of three passes to Department of Defense Buildings. A series 3 pass (Form DD 1468) is given by the Assistant Secretary of Defense for Public Affairs. Temporary passes for a specific building are Series 4 passes (DD Form 1469) and Series 5 passes are visitor passes and usually involve an escort while in the building (DD Form 1470-1).

--AR 360-65 (OPNAV 5530-3A and Air Force Regulation 190-11) issue date April 1966. "Establishment and Conduct of Field Press Censorship in Combat Areas" which outlines regulations governing overseas correspondents and the censorship requirements of photography, TV and radio broadcast in combat areas.

In AR 360-28 "Guidance for Conduct of Information Action in Support of Army Air Defense Command Missile Program", paragraph eight states that the Commanding General, United States Army Air Defense Command must give permission for any photography by non-armed forces photographers of missile sites and that all visits to sites must have an escort officer. Photographs are subject to the limitations listed in a. through e. of paragraph eight. Missile cutaway views, any control panels, and views showing the number of silos in a field are specifically prohibited.

The military regulations pamphlets are available in some of the regional Federal Depository libraries. They can also be obtained, by writing the Department of the Army:

U.S. Army Adjutant General Publications Center
2800 Eastern Boulevard
Baltimore, Md. 21220

or

Naval Pubs & Forms
5801 Tabor Avenue
Philadelphia, PA 19120

The Air Force publishes most of its regulations in the CFR. Prepare for as much as a three month delay following your request.

CODE OF FEDERAL REGULATIONS

Certain sections of the Code of Federal Regulations affect news photographers. The most pertinent ones will be listed as they appear in the 1981 edition of the CFR. Each Title of the CFR is updated monthly, quarterly and annually and these regulations may change so it is best to check the updated edition. Each branch of the armed forces has its own regulations and its own sections in the code.

CFR sections of interest to photojournalists are: 32 CFR 552.18 "Authority and Responsibility of the Post Commander."

> (f) Entry, exit and personal search. The *** commander will establish rules that govern the entry into and exit from the installation and the search of persons and their possessions *** (1) *** Persons who are entering the installation should not be searched over their objection, but they may be denied the right to entry if they refuse to consent to the search.

--10 CFR 160.1-8

"Trespassing on Nuclear Regulatory Commission Property" Unauthorized entry is prohibited onto any facility installation or real property subject to the jurisdiction of the nuclear regulatory commission. Penalty maximums are $5,000 fine and imprisonment for not more than one year. The area must be posted and listed in the Federal Register.

--32 CFR 761 to 770.31 Subchapter F specifically outlines regulations governing Naval Defense Sea Areas;

Naval Airspace Reservations; Areas under Navy administration and Trust Territory of the Pacific Islands. This subchapter also publishes rules relating to specific military areas. It is interesting that most of these regulations appeared after an access court case arose in that specific military area.

--Subchapter G (32 CFR 770 to 770.31) "Miscellaneous Rules" has a specific section (765.4) "Visitor Control" which states that access to all naval activity afloat or ashore is subject to the authorization and control of the officer in charge.

--32 CFR 761.20 "Additional Instructions" bans all private cameras from Naval Defense Sea Areas. This regulation is based on the 1942 law and should have lapsed.

--32 CFR 705 "Public Affairs Regulation for the Department of the Navy" has several sections affecting photographers:

705.5 "Taking of Photographs on Board Naval Ships, aircraft and installations by the members of the general public," includes, by definition, the news media. It prohibits photographic equipment without specific authorization of the commanding officer.

705.10 "Still Photography" is reproduced at the end of this section.

--32 CFR, Subchapter C, 821-827 prints Air Force regulations affecting news photographers.

Part 822 "Public Relations" covers information on internal audio-visual activities which supply news

film through the Department of Defense newsfilm pool in Washington, D.C.

Part 827 forms the basis of AFR 190-10 Air Force policy on the "Release of Information on Accidents." Section 827a.3 on "Control of Photography" is reproduced in the appendix. In general, officers at accident sites are directed to inform photographers if classifed material is visible and request their cooperation. They also are to inform photographers that 18 USC 797 and 8 apply and, if photography continues, are to summon local law enforcement officials and inform the pentagon. Their regulations do not allow Air Force personnel to physically restrain photography on off-base accident sites.

If there is any immediate question on these regulations, the main information number of the Pentagon is 202-545-6700.

Navy Policy

705.5 Taking of photos on board naval ships, aircraft and installations by members of the general public.

(a) Visitors will not be allowed to take photographic equipment on board a naval ship or aircraft or into a naval activity or to take photographs within a naval jurisdiction unless specially authorized by the officer in command or higher authority.

(b) Guests of the Navy who wish to take photos within naval jurisdictions will be advised of areas where photography is permitted. An escort will be assigned to assure that security is maintained, unless photography is permitted throughout the ship, aircraft or installation, or the areas in which it is not permitted are appropriately guarded or secured.

(c) If there is reason to believe that film exposed by a visitor or media photographer contains classified information, the film will be processed under Navy jurisdiction.

(1) Classified photos, if any, will be retained. All unclassified film will be returned to the owner.

(2) When film exposed by civilian visitors or media representatives in sensitive areas is beyond the capability of the local command to process, it may be forwarded to the Commanding Officer, Naval Photographic Center, for processing. Any special processing instructions should be sent with the film.

705.6 Releasing public information material to the media.

(a) Methods of releasing information:

(1) Release at the seat of government and/or as approved by the Assistant Secretary of Defense (Public Affairs).

(i) Overall responsibility for release of information rests with the Assistant Secretary of Defense (Public Affairs). The Chief of Information is responsible for coordinating with him releases of national and international interest and in the case of audio-visual material of regional interest) and for arranging for local release of such material if considered appropriate by OASD(PA). Information of the above types and also information proposed for release

§ 705.10 Still photography.

(a) Policy and procedures on taking photos by the general public, given in § 705.5 apply also to media representatives.

(b) Basic policy and procedures for still photos are set forth in the Manual of Naval Photography, OPNAVINST 3150.6D.

(c) Authority to forbid photography:

(1) On Navy property, the officer in command may forbid the taking of photographs and may confiscate film, reviewing it if it is suspected that classified material has been photographed. In such cases, all unclassified photos will be returned promptly to the photographer.

(2) Navy personnel have no authority to confiscate film off Navy property. If, as in an accident, classified equipment is exposed which cannot be removed or covered, Navy representatives will ask news media photographers not to photograph it and will inform them of 18 U.S.C. 793(e), 795, 797, which makes it a criminal offense to photograph classified material. Navy personnel will not use force if media photographers refuse to cooperate, but will instead seek the assistance of appropriate civil authorities and/or the photographer's superior in recovering film or photographs presumed to be of classified nature.

(3) If media photographers are uncooperative in regard to protection of classified material, an account of the matter will be forwarded to the Chief of Information.

(d) Release of photographs:

(1) Most unclassified photographs of interest to the public may be released to news media. However, the rights of individuals photographed and special constraints such as those described in section 0403 of the Public Affairs Regulations must be taken into consideration before a decision is made to release a photograph. In addition, photos which might be harmful to recruiting or otherwise not be in the Navy's best interests will not be used unless this failure to release them constitutes suppression of legitimate news.

(2) Photographs of strictly local interest can be made available by the command to local media without being submitted to review by higher authority.

(3) If a feature type photo released locally is considered of possible interest elsewhere, because of its human interest or artistic merit, a single print should be forwarded to the Chief of Information, together with a notation of the distribution made.

(4) Photographs of national interest:

(i) "Spot news" photos may be released by a District Commandant or Fleet or Force Commander.

(ii) If a photo has been released by a local command to national news media:

(A) The original negative or transparency will be forwarded by the fastest available means to the Commanding Officer, Naval Photographic Center, Naval Station, Washington, D.C. 20390. Such forwarding will be in accordance with the Manual of Naval Photography, par. 0445, subparagraphs 3 and 4.

(B) One print, a copy of the letter of transmittal, and the distribution list will be forwarded to the Chief of Information.

(C) Navy units with a Unified Command will forward the photos through Unified Command channels.

(D) All other commands will forward the photos to the Chief of Information who will effect coordination with the Office of the Assistant Secretary of Defense (Public Affairs) and, if necessary, arrange for security review.

(iii) Photography of research activities is normally considered to be of national interest.

(iv) Still photographs of national news interest may be forwarded, unprocessed, for release by the Chief of Information by any command not subject to the authority of a Unified or Specified Commander. Such forwarding will be in accordance with paragraph 0445, subparagraph 3, of the Manual of Naval Photography. All available caption material will be forwarded with this unprocessed photography.

§ 827a.3 Control of photography.

(a) *Outside military installations within the United States and its territories.* (1) At the scene of an accident, Air Force representatives should advise news media representatives, to the extent feasible, not to go too close for their own safety, when there is danger of an explosion or other hazard. Media representatives will also be advised not to interfere with firefighting and investigative activities; however, Air Force personnel will not forcefully exclude media representatives from nonnuclear accident areas.

(2) If the senior Air Force representative at the scene is qualified to do so, he will determine, as soon as possible, whether classified defense information is exposed. If he is not qualified, he will immediately summon someone who is. This determination must be made as soon as possible. If no classified defense material is exposed, the Air Force representative will permit photographs. If classified defense information is exposed, he will have it covered or removed immediately before permitting photographs.

(3) If exposed classified defense information cannot be removed or covered immediately, the senior Air Force representative will advise news media representatives that he cannot give permission to make photographs. Also, he will:

(i) Inform news media representatives of the presence of exposed classified defense information which cannot be removed or covered immediately, and ask them to cooperate in its protection. Inform photographers that violations of the prohibition on photographing classified defense information are also violations of Federal criminal statutes (18 U.S.C. 795, 797).

(ii) Refrain from using force if news media representatives refuse to cooperate in protecting the classified defense information, but request:

(a) The assistance of appropriate civil law-enforcement officials in preventing compromise of such material and in recovering all photographs, negatives, and sketches presumed to contain classified defense information; and

(b) The cooperation of the superiors of the offending news media representatives, informing them that publication of the classified defense information or refusal to return it to military authority will be a violation of Federal statutes (18 U.S.C. 793(e), 795, 797).

(iii) Submit to the Assistant Secretary of Defense (Public Affairs) (ASD/PA), through channels, a message report concerning refusals of news media representatives or their superiors to cooperate as prescribed in paragraphs (a)(3) (i) and (ii) of this section.

(4) If the senior Air Force representative at the accident scene does not know whether classified defense information is exposed, he will so inform photographers and advise them that he cannot give permission to make photographs. He will also explain that if they take pictures without permission, they may violate Federal law and compromise national security (18 U.S.C. 795, 797). Air Force personnel will not physically restrain news media photographers from making photographs.

(b) *Outside an Air Force installation in a foreign country.* Actions restricting photographs of accidents will be according to treaties, intergovernment agreements, understandings, laws of the host country, and implementing instructions issued by oversea commanders concerned. Oversea commanders will publish appropriate supplements to this regulation for their areas of responsibilities, consistent with the provisions of applicable treaties, agreements, understandings, and laws.

(c) *Within an Air Force installation.* (1) Competent authority will determine as quickly as possible whether classified defense information is exposed. If none is, news media photographs will be permitted. If classified defense information is exposed, it will be removed or covered as soon as possible and photographs will then be permitted.

(2) If classified defense information is exposed and cannot be removed or covered, all civilian photographs will be forbidden. If photographs are made, they will be taken into military custody for prompt development and examination. Receipts for the photographs will be given. Upon development, photographs that show no classified defense information will be returned to the person who made them. Any that show classified defense information will be turned over to the Office of Special Investigations.

§ 827a.4 Release of information.

(a) Upon being advised that an accident has occurred, the commander of the base nearest the scene will instruct his information officer to provide all releasable information to news media as quickly as possible. If he does not have an information officer, the commander must personally assume responsibility for releasing information until a qualified information officer is available from another installation. After his initial report to news media, the commander or information officer will remain in communication with officials at the crash site and with news media. If additional information personnel are available at the base, the information officer will go to the site of the accident, or send a representative as quickly as possible. If both the commander and the information officer visit the scene, an information representative must remain at the base to answer queries from news media.

(b) Major commands will periodically call to the attention of installation commanders without primary duty information officers the regulatory provisions and requirements for release of

Section IV. AUDIOVISUAL

3–23. Support. *a.* Photography, television, audio, and graphic art to support public and command information programs and similar matters is authorized. Policies and procedures for audiovisual support are in AR 108–2.

b. Recording and reproduction for PA purposes will be limited to the minimum required to satisfy official needs.

c. Audiovisual coverage of VIP visits should be restricted to minimum essential requirements. Additional information on preparation of visit books and similar materials is in AR 108–2.

d. Civilian activities and social events normally are not proper subjects for military audiovisual documentation.

3–24. Recording of soldiers. Public affairs officers should use care in releasing audiovisual documentation of soldiers. Soldiers always should shown in situations which reflect accurately Ar activities and missions. Audiovisual media not be used to ridicule an individual.

3–25. Recording at courts-martial. News me requests to photograph or record during a t by court-martial will be guided by the followi unless more restrictive measures are necessary security reasons to ensure a fair trial:

a. Photographing or video-tape recording of courtroom interior may be permitted when per involved in the proceedings are not present.

b. During the trial, photographing or recor the accused may be permitted when he/she is doors in public view. Photographing or recor an accused at any time will be done only u proper circumstances and never in a courtr

c. The following actions on war wounded and dead are also prohibited:

(1) Photographing, recording, or interviewing war wounded in medical facilities in transit if the necessary intelligence briefing has not been completed. (In special cases, a wounded individual's files should contain documentary evidence that intelligence briefing, if required, has been accomplished.)

(2) Photographing, recording, or interviewing war wounded in medical facilities in transit if the photography or the interview interferes with medical treatment.

(3) Photographing, recording, or interviewing war wounded in medical facilities in transit if the physical condition of the wounded individual prohibits such activity.

(4) Photographing, recording, or interviewing war wounded in medical facilities in transit if the wounded individual objects.

(5) Photographing or recording in preparation rooms of graves registration facilities or in temporary cemeteries (AR 638–30 and FM 10–63).

d. Unofficial photography or interviews by commercial media representatives of the persons and situations listed in *b* and *c* above should be discouraged. Public affairs officers will inform the media representatives of Army restrictions and of the impropriety of their actions. If a photographer persists in taking photographs, the public affairs officer should not take any action to recover the film, but will immediately report the problem through *public affairs channels* to higher headquarters.

3–30. Photographing and recording personnel under treatment in Army medical facilities. Permission to photograph or record a patient in a US Army medical facility will be given only when the prior informed consent of the patient has been obtained in writing. In addition the attending physician and/or medical facility commander must determine that such activity will not jeopardize the condition or welfare of the patient or nearby patients. Patient photography will be prohibited when it infringes on the patient's right to privacy or causes embarrassment. At all times, photography of patients must be accepted standards of propriety and be in accord with paragraph 3–29*b*.

cell, cellblock, prison yard, or similar area, or in the presence of other prisoners. Progress of a trial must not be impeded by such actions.

3–26. Photographing or recording prisoners. Prisoners will not be photographed or recorded except under chapter 5, AR 190–47 and paragraph 3–25*b* of this regulation.

3–27. Photographing military installations or equipment. Photographing, sketching, or making graphic representations from the ground or the air, of military equipment classified under DODD 5200.1 and AR 380–5, or of installations designated Restricted Areas under AR 380–20, is punishable by law (18 USC 795). The reproduction, publication, or sale of this type of material is also punishable by law unless the photograph, sketch, or graphic representation indicates it has been reviewed and cleared for release by proper authority. (See 18 USC 795, 796, and 797, implemented by E.O. 10104, 1 Feb 1950, and sec. I, DA Bul 5, 1959.) If legal proceedings become necessary, guidance should be obtained from the staff judge advocate of the installation or activity concerned.

3–28. Release of unclassified official audiovisual information to foreign nationals. (This regulation does not apply to the release of information to government representatives through intelligence channels.) The procedures and policies in this regulation on release of information to US media, organizations, or individuals apply to the release of official audiovisual material to foreign nationals. However, requests of an unusual or sensitive nature should be referred to HQDA(SAPA–PP), WASH DC 20310 for coordination with proper agencies and approval.

3–29. Photographing and recording personnel in a hostile area. *a.* Care must be used in releasing information, photographs, and recordings of US personnel and allied forces killed, wounded in action, hospitalized, detained as a result of hostile action, or missing in action. Every consideration must be given to the rights of the individuals concerned, to the effect publication of information or photographs would have on families and friends, and the potential adverse effect on military morale. The PA officer will control media access to locations where common sense, good taste, and civilian practice prohibit access by photographers (e.g., medical field operating and surgical areas). In the case of wounded personnel, the provisions in *b* and *c* below apply while an individual is in an area of hostile action, at a point of embarkment or entry, at a hospital or other military convalescent installation, or in transit.

b. Release of the following is prohibited:

(1) Photographs or video-tape recordings of recognizable wounded or dead personnel not identified by name.

(2) Photographs or video-tape recordings of recognizable wounded personnel identified by name, until next of kin have been notified, unless the release is approved by the wounded.

(3) Photographs or video-tape recordings of recognizable wounded personnel who have requested that their next of kin not be notified.

(4) Surgical or other major medical care photographs or video-tape recordings which identify the patient.

(5) Photographs or video-tape recordings showing deceased and/or wounded personnel in large numbers. Official photographs of combat dead under field conditions normally will not be released to the public media.

(6) Photographs or video-tape recordings showing mangled bodies, obvious expressions of agony, or expressions of severe shock.

(7) Photographs or video-tape recordings of, information about, or interviews with, psychiatric or other mental patients.

(8) Photographs or video-tape recordings of plastic surgery or severe disfigurement cases, unless restorative effects are so successful they create confidence by the general public in use of such techniques. In all such cases, the patient's permission to release the photographs must be obtained. Notations on permission will be placed at the end of the identifying captions.

(9) Photographs or video-tape recordings of blind or deaf patients, unless permission for release is given by the patient. Notations on permission will be placed at the end of the identifying captions.

(10) Photographs or video-tape recordings of amputees demonstrating prosthetic appliances, unless permission is given by the patient. Notations on permission will be placed at the end of the identifying captions.

(11) Photographs or video-tape recordings of personnel missing in action or detained before next of kin have been notified and search-and-rescue operations have been terminated.

CONCLUSIONS

In the laws attached to entering and photographing military areas, the legal lot of photojournalists has been cast with that of pimps, spies, and demonstrators, and their rights are no greater than those obtained by these groups, which are few.

The sum of these statutes and regulations seems to be that, when dealing in military matters, news photographers are restricted in their access to photographic opportunities and may be subject to prior restraint. The photographic statutes prevent photographers from making pictures whenever classified areas or equipment are involved. Whenever that is the case, officers are instructed to inform photographers and, unfortunately, their word must be accepted. Even when one suspects that this information may be forthcoming for public relations reasons rather than security reasons, the photographer must still obey or risk prosecution.

The trespass statute, 18 USC 1382, effectively prevents any entry to a closed post without the permission of the commander. Entry to an open post or area is limited by the commander's franchise to summarily search and eject.

The harsher provisions of the 1942 statute, 50 USC 831-5, have expired, but the military does not seem to have reflected this in their regulations. In a sense, they need not, because when the trespass statute is linked with the

McCarran Act, 50 USC 797, commanders have a great deal of control over visitors. The pertinent regulations are:

Army 32 CFR 552.18

Navy 32 CFR 765.4

Air Force 32 CFR 809a

Most of the penalties are personal in that they accrue directly to the photographer, not to the employer.

The major photographic restriction comes when classified equipment is in view (18 USC 765-7), or when in a naval defensive sea area (32 CFR 761.20). These restrictions apply to news photographers in that they are members of the public. Some protection from the Censorship Statute (50 USC 798) may come when a photograph is published. Given the present panoply of laws and regulations, photographers have no choice but to accept military guidance as to when photography is or is not acceptable. The motto may well become "Click your heels before you click your camera."

RECOMMENDATIONS

That 50 USC App 781-85 and regulations pursuant to it be removed from the U.S. Code.

That Congress examine the photographic statutes in light of:

1. Their certain effect of prior restraint on publication,
2. The possibility that they are impermissibly vague on the question of intent, and
3. Whether the term, publication, in 18 USC 797 violates the First Amendment.